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# Should we call a lawyer?

LEA WISKEN — 7 September, 2015

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**Towards a conceptualisation of norm conflicts for International Relations**

*Lea Wisken*

In this post, I argue that traditional legal conceptualisations of norm conflicts do not capture the phenomenon that International Relations (IR) scholars are interested in. I propose an alternative definition, which links norm conflicts to political contestation. The number of international treaties registered with the UN approximates 50.000. What are the odds of all these treaties being consistent? Infinitesimally small, one might think. As a result, even IR scholars – traditionally concerned with war, power, and interest – have become interested in overlapping international institutions: what if such overlaps create yet

another opportunity for states to use the law as a political tool?

More precisely, IR scholars worry that when overlapping institutions issue contradictory norms, states will pick and choose between those rules. This may trigger political disputes and undermine international cooperation. The best-known example of a dispute arising from legal fragmentation is the GMO dispute. The EU used the Cartagena Protocol precautionary principle to justify import restrictions on GMO products. The US, in turn, accused the EU of using the Protocol as an excuse to sidestep its WTO obligations.

The GMO dispute figures prominently in the International Law Commission report on fragmentation and in case studies of (potentially) conflicting norms by just about every author working in the field, including Krisch, Dunoff, Trachtman, Matz-Lück, Young, Gehring, Faude, Oberthür, Zelli, and van Asselt. Few case studies examine other conflicts. There are no comparative analyses of norm conflicts. What explains the discrepancy between the high theoretical relevance of norm conflicts and the lack of empirical studies? How can the gap be closed?

**Tracing the origins of the empirical gap**

Behind the empirical gap lie two interrelated problems with applying traditional legal conceptualisations of norm conflicts to the IR context. First, the legal presumption against conflict leads to a very narrow definition of norm conflicts. Second, the assumption that international law is a legal system implies that conflict is resolved the instant it

emerges. There is no such thing as an unresolved norm conflict inside a legal system.

According to the traditional objectivist approach, identifying norm conflicts can be done purely on the basis of juxtaposing treaty rules and applying a list of criteria – an "objective standard" – to determine whether they conflict or not. The presumption against conflicts leads most lawyers to apply very narrow criteria to this test. Most commonly cited is Wilfred Jenks' definition of conflict as the inability to follow two rules at the same time. Accordingly, rights and exemptions cannot trigger conflict, since they can be foregone without breaking the law. This also applies to the European *right* to restrict GMO trade. Jenks' definition fails to capture what triggered maybe the most heated dispute on overlapping norms. Other definitions fare only slightly better.

The assumption that international law is a unified system brings further difficulties. It implies that norm conflicts will be resolved through some conflict clause or Vienna Convention on the Law of Treaties (VCLT) rule the very moment they arise. A legal system may allow for conflicts, but it does not, by its very nature, allow for unresolved conflicts. However, there is a discrepancy between this assumption of unity, and the myriad of disputes related to interpreting, applying, and accepting law. No analytical distinction is made between norm conflicts that can clearly be resolved through one conflict clause, and norm conflicts where conflict clauses are ambiguous or VCLT rules compete. IR scholars are mainly interested in overlapping norms that trigger disputes – not with overlapping norms that are in conflict according to some checklist, but where everyone agrees which norm prevails.

**Norm conflicts as political contestation**

As a result, while IR scholars and international lawyers have to date used the same vocabulary of "norm conflicts", they have been talking about fundamentally different things. To close the empirical gap, IR scholars need to either introduce a new concept, or redefine norm conflicts. I propose an alternative, non-objectivist definition of norm conflicts in international law: norm conflicts occur in the course of political disputes when states justify their different standpoints with references to different rules of international law and disagree about which rule prevails. This conceptualisation does not merely capture a special type of political dispute, it also says something meaningful about the relations between the two rules: they are being interpreted in incompatible ways and states disagree about which rule prevails.

Norm conflicts always come with a *concrete* political dispute, (at least) two *concrete* disputed rules, and two contending parties, composed of one or more states. The concreteness requirements exclude resource conflicts, which have always existed independent of legal fragmentation. The threshold requirement of state participation ensures international relevance.

The obvious criticism of this conceptualisation is that conflict can exist below the surface, without erupting into open contestation. Yet how can one know about suppressed conflict, if no party shows signs of discontent? That would be like claiming that it is possible for an outsider to identify marital conflict, even if both husband and wife seem perfectly happy. In international law, the objectivist checklist-approach will find many incompatibilities without

political relevance. It will also dismiss many tensions with political relevance. My conceptualisation, by contrast, treats those norms whose overlap leads to real-world disputes about legal behaviour as conflicting. I will only say that a couple has a conflict when I have evidence they have been fighting.

My conceptualisation successfully performs a crucial balancing act: it is sufficiently narrow to exclude cases where one norm clearly and undisputedly takes precedence. At the same time, it is sufficiently wide to not exclude *all* cases where tensions between rules can be resolved through *some* conflict clause. After all, conflict rules like *lex specialis* or *lex posterior* often point in different directions. Norm conflicts exist only if conflict clauses fail to establish sufficient legal clarity to forestall political contestation. No skills of treaty interpretation are needed to identify them. This alternative conceptualisation of norm conflicts should enable IR scholars to close the empirical gap. It would be interesting to see whether international lawyers working on legal fragmentation can also benefit from this conceptualisation.

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